## Attachment 1

## Congress of the United States

Washington, DC 20515

March 23, 2010

Via Hand Delivery

Richard Westling, Esq. Ober Kaler Grimes & Shriver 1401 H Street, N.W. Suite 500 Washington, D.C. 20005

Re:

Impeachment of Judge G. Thomas Porteous -

**Exhibit List and Exhibits** 

Dear Mr. Westling,

We look forward to working cooperatively with you to ensure that that the proceedings in the Senate may proceed expeditiously and without unnecessary delay. To that end, this is the first of what is likely to be several letters we will be sending you to address the trial preparation process.

Enclosed please find an Exhibit List that lists the documents (including transcripts and other materials) cited in the Committee Report as well as other exhibits that have been marked in anticipation of their potential use at trial. Also, please find a disc that contains electronic copies of all of the exhibits on the list. If additional exhibits are identified for use at trial, we will mark them and provide you copies.

The exhibits on the disc have been redacted to delete reference to personal identifying information (such as social security numbers) and, in some instances, to delete references to third parties. We will make available for your inspection the original unredacted materials at your request.

In addition, the House, through the Committee on the Judiciary's Impeachment Task Force, has obtained materials that were not marked as exhibits and have not been not copied. These generally include:

- Financial records, such as Judge Porteous's personal bank records, IRA records, various credit card records, and certain gaming records, of Judge Porteous. These records were originally obtained by the Department of Justice, and the Task Force obtained them either from the Fifth Circuit or from the Department of Justice.
- Financial records, such as credit card statements and business records, for some of the witnesses. These were originally obtained by the Department of Justice.

Other materials obtained from the Fifth Circuit or third parties.

It appears that the bulk of these records were made available to Judge Porteous in connection with the Fifth Circuit proceedings.

These materials are available for your inspection and copying upon your request. If you wish to review these materials, please contact Mark H. Dubester, 202-226-2404, or Harry Damelin, 202-226-0144, to arrange a time to review them.

Sincerely,

Alan I. Baron

Special Impeachment Counsel

Enclosures

# Attachment 2

## Congress of the United States

Washington, DC 20515

May 11, 2010

Richard Westling, Esq. Ober Kaler Grimes and Shriver 1401 H Street, N.W. Suite 500 Washington, D.C. 20005

Re: Impeachment of Judge G. Thomas Porteous - Discovery

Dear Mr. Westling,

This letter responds to your letter of May 6, 2010.

As you know, there are no formal "rules" that provide for discovery in an impeachment trial. Nonetheless, consistent with precedent, the House takes the position that it is appropriate that the House provide the following materials: 1) any tangible evidence the House Managers intend to use at trial; 2) any sworn or adopted statement of a witness to be called at trial; 3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and 4) any exculpatory evidence. The House has in fact provided materials (as well access to inspect materials) that exceed those categories, and exceeded the discovery it provided in the Hastings and Nixon proceedings. It has done so, not because Judge Porteous is entitled to these materials, but rather in order to avoid unnecessary discovery disputes and to expedite the trial preparation process. It is against this statement of principles that we address your specific requests.

Paragraph 1. You are correct that some of the exhibits are excerpts from larger document collections. In the spirit of cooperation and in order to expedite the trial preparation process, we will make the entire document collections from which these records were selected available for inspection and copying, if you so desire.

Paragraph 2. As you have noted, certain of the exhibits have been redacted by the House and the Department of Justice (DOJ). You are free to inspect unredacted versions of the documents that the House redacted.

It is apparent that the bulk of the DOJ redactions – over which the House had no control – consisted of deleting identifying information as to witnesses, sources, and other materials that relate to persons other than Judge Porteous. There is nothing in the context of those documents that suggests that any redacted materials would be relevant to Judge Porteous's defense. In any event, the House has not had access to and will not use unredacted versions of these documents. Thus, the House cannot accommodate your request in this regard.

Paragraph 3. You have asked for "all of the materials the Committee reviewed as part of the investigation." This request is beyond the legitimate scope of discovery. Even a defendant in a criminal case where liberty is at stake is not entitled to replicate the investigation. Accordingly, we decline to produce materials responsive to this request.

In response to your request for information concerning depositions and other witness materials, we represent that all depositions have been produced. We decline to identify the names and identities of every person the House spoke to, where those individuals did not provide exculpatory information and will not be witnesses in this case. As stated previously, Judge Porteous is not entitled to replicate the House investigation.

If you have any questions, please do not hesitate to contact Mark H. Dubester, 202-226-2404, or, Harold Damelin, 202-226-0144, so we can discuss and try to resolve any issue you might have.

Sincerely,

Alan I. Baron

Special Impeachment Counsel

## **Attachment 3**

## Congress of the United States

Washington, DC 20515

April 13, 2010

The Honorable Claire McCaskill Chairman, Senate Rule XI Impeachment Committee United States Senate Washington, D.C.

The Honorable Orrin Hatch Vice Chairman, Senate Rule XI Impeachment Committee United States Senate Washington, D.C.

Re: Impeachment of Judge G. Thomas Porteous, Jr. – Preliminary Matters

Dear Senator McCaskill and Senator Hatch:

The purpose of this letter is to address the questions set forth in the March 31, 2010 email from Senate Legal Counsel Frankel relating to certain preliminary procedural issues in connection with the impeachment trial of Judge Porteous.

<u>Pretrial Motions</u>. The House may raise pre-trial motions regarding the following matters:

- Motion to admit as substantive evidence specific prior sworn testimony at the Fifth Circuit Special Investigative Committee Hearing [the Fifth Circuit Hearing] and at the House Impeachment Task Force Hearings where Judge Porteous or his counsel has either cross-examined the witness or has been provided the opportunity to do so;
- Motion to admit as substantive evidence the sworn testimony and other statements of Judge Porteous at the Fifth Circuit Hearing;
- Motion to admit certain documents into evidence, the authenticity and relevance of which are not in dispute. These would include, for example, court records (the curatorships, the <u>Liljeberg</u> proceedings, and the bankruptcy proceedings) or other similar documents. It is possible that this motion will be unnecessary, or will be limited in scope, depending on whether a stipulation can be reached with Judge Porteous's counsel on this topic;
- Motion to permit or admit expert testimony; and

Motion relating to stipulations, if appropriate.

Stipulations as to the authenticity of documents. The House believes that the authenticity of the documents that are relevant to the impeachment trial is beyond real dispute. These documents generally consist of court records, transcripts, financial records, public records and certain business records. The House has already identified those documents which are likely to be used in the Senate trial (using the same exhibit numbers from the Report that accompanied the Impeachment Resolution), and has provided counsel for Judge Porteous a disc containing the documents and an exhibit list. By separate letter dated April 9, 2010, the House has requested that Judge Porteous stipulate to the authenticity of the documents on the exhibit list.

Stipulations as to facts. The House believes that a significant portion of the facts that are alleged in the Articles are uncontested or have been established beyond legitimate dispute. As an example, Judge Porteous has admitted to pertinent facts surrounding his relationship with attorneys Jacob Amato and Robert Creely – including his financial relationship with them prior to becoming a Federal judge, his handling of the <u>Liljeberg</u> case, his solicitation and acceptance of cash from Amato when the case was pending, and his acceptance of other things of value from Amato and Creely while the case was pending. Similarly, the essential facts surrounding Judge Porteous's handling of his personal bankruptcy are not in dispute. The House is in the process of preparing a number of proposed factual stipulations, and will soon be providing them to Judge Porteous's counsel for review.

Nonetheless, to expedite the stipulation process, the House suggests that at the time the Committee sets a motions schedule in this case, it direct each party to consider stipulations proposed by the other party. The House further suggests that "any proposed stipulation of fact [or as to authenticity] . . . be accepted as true unless the opposing party file[s] an objection which include[s] a proffer as to why the proposed stipulation of fact [or authenticity] should not be accepted as true." The House urges that the Committee direct that this process be completed as of the date that responses to motions are due to be filed.

Evidence from prior proceedings. It is the position of the House that all the testimonial or documentary evidence that was admitted into evidence in the Fifth Circuit proceeding is admissible in the Senate trial. (As noted, the House may file a motion seeking to admit particular evidence in advance of the Senate trial.) At this point in time the House does not anticipate seeking to admit testimony or witness statements that have not been subject to cross-examination. The House cannot rule out the possibility that circumstances may arise where it would seek to have the Committee consider sworn prior recorded testimony or other statements of witnesses whose credibility had not been questioned or whose statements relate to facts not in

<sup>&</sup>quot;Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101<sup>st</sup> Cong., 1st Sess. 169 (1989).

## substantial dispute.2

<u>Witnesses</u>. The House may call the following witnesses. The nature of the testimony of the respective witnesses is generally described in the Report that accompanied the Articles of Impeachment. Depending on the nature of the cross-examination or the defense case generally, it is likely that it will not be necessary to call all of them, and, of course, it may be necessary to call other witnesses to address factual contentions that may be raised by the defendant. Those who sought immunity in connection with the House investigation are indicated.

## Article 1

- 1. Robert Creely [Immunity]
- 2. Jacob Amato [Immunity]
- 3. Leonard Levenson [Immunity]
- 4. Donald Gardner
- 5. Joseph Mole
- 6. Rhonda Danos [Immunity]

## Article 2

- 7. Louis Marcotte
- 8. Lori Marcotte
- 9. Ronald Bodenheimer
- 10. Bruce Netterville [Immunity]
- 11. Mike Reynolds
- 12. Jeffrey Duhon
- 13. Aubrey Wallace

## Article 3

- 14. Claude Lightfoot
- 15. FBI Special Agent DeWayne Horner
- 16. FBI Financial Analyst Gerald Fink
- 17. Richard Greendyke

## Article 4

- 18. Former FBI Agent Cheyanne Tackett
- 19. Former FBI Agent Robert Hamill

<sup>&</sup>lt;sup>2</sup>See, e.g., "Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101<sup>st</sup> Cong., 1st Sess. 170 (1989).

<u>Length of the case-in-chief</u>. The House believes it can put on its case-in-chief in 30 hours of direct testimony.

Other. On March 23, 2010, the House provided to Judge Porteous all the exhibits cited in the House Report, as well as other materials marked as exhibits and an accompanying Exhibit List. (In that the Report refers to matters such as procedural and litigation background that are not going to be part of the trial in this case, the Exhibit List contains numerous documents which will not constitute evidence at trial.) The House also made available other documents and records for inspection. Judge Porteuos's attorneys have already made an initial review of these other documents. (A copy of the letter and Exhibit List is attached.)

A review of the Exhibit List provided to Mr. Westling reveals that there are virtually no materials with which Judge Porteous is unfamiliar. A significant portion of the documents on the Exhibit List were provided to Judge Porteous in connection with the Fifth Circuit Hearing or consist of testimony taken at that Hearing.<sup>3</sup> Other significant sets of records include: 1) various documents describing the procedural background in this case; 2) court documents with which Judge Porteous is personally familiar, such as the records from the <u>Liljeberg</u> case, over which Judge Porteous presided; and 3) documents consisting of the grand jury-related litigation in this case.<sup>4</sup>

Though the Committee on the Judiciary's Impeachment Task Force developed additional corroboration for certain of the allegations – such as by obtaining the curatorship orders issued by Judge Porteous to Robert Creely, obtaining records of bails set by Judge Porteous that benefitted the Marcottes, obtaining the orders by which Judge Porteous set aside convictions, or engaging in further analysis of Judge Porteous's financial records related to his bankruptcy – a review of the Articles demonstrates they set forth virtually no substantive allegation of which Judge Porteous and his attorney were not personally aware:

<sup>&</sup>lt;sup>3</sup>These include a substantial portion of Exhibits 11-49, relating to Amato, Creely, Gardner, Levenson and Danos; Exhibits 100-114, consisting of Judge Portoues's financial disclosure reports; Exhibits 120-124, consisting of the Lightfoot grand jury testimony; exhibits 124-149, consisting of various bankruptcy records; and Exhibits 301-343, consisting of casino records and a few other miscellaneous bankruptcy-related records.

<sup>&</sup>lt;sup>4</sup>Exhibits 1-10 are background documents related to the procedural history of this case; Exhibits 50-68 are <u>Liljeberg</u> court records; Exhibits 400-436 are the litigation documents related to Judge Porteous's efforts to keep relevant materials from the House and Senate. In addition, Exhibits 150 through 200 generally consist of records related to Judge Porteous's seeking and acceptance of trips and gifts from various parties that are not charged in the Articles but are contained in the Report. Exhibits 200 through 300 are Depositions exhibits. Some of these are photographs (and some of the photographs include Judge Porteous), but many are duplicates of documents that were marked and listed in other places on the Exhibits List and include numerous exhibits related to matters not charged in the Articles.

Article I. Judge Porteous has been aware of the details and substance of the <u>Liljeberg</u> allegations since in or about late 2003. Judge Porteous was provided with the documents, including grand jury testimony, related to his relationships with the Robert Creely and Jacob Amato and his handling of the <u>Liljeberg</u> case in connection with the October 2007 Fifth Circuit Hearing. At that Hearing, he cross-examined Creely, Amato, and Joseph Mole – the critical fact witnesses. Judge Porteous was also present at the Task Force Hearing at which those three men testified and were cross-examined by his counsel.

Article II. Judge Porteous has been familiar with the Marcotte allegations since at least 2003. Indeed, in early 2004, Judge Porteous's criminal defense attorney at the time engaged in affirmative defensive efforts on Judge Porteous's behalf to keep him from being charged in the Marcotte corruption scheme. These efforts included obtaining from Louis Marcotte an affidavit that attempted to exculpate Judge Porteous from allegations that he (Judge Porteous) received cash in exchange for his taking official acts in lowering bonds. In addition, Judge Porteous's present counsel, Mr. Westling, is personally and intimately familiar with the Marcotte allegations – having represented Louis Marcotte in connection with his guilty plea in March 2004 and, in fact, having been present representing Louis Marcotte during Louis Marcotte's debriefing interviews with the FBI in 2004.<sup>5</sup> The allegations in Article II track the substance and detail of those interviews and Louis Marcotte's and Lori Marcotte's Task Force testimony, at which Judge Porteous was in attendance.

Article III. Judge Porteous has been aware of the details and substance of the bankruptcy allegations since at least 2004, when his bankruptcy attorney, Claude Lightfoot, was subpoenaed to the grand jury in connection with the Department of Justice criminal investigation. Judge Porteous was provided complete discovery on this topic at the Fifth Circuit Hearing, including Lightfoot's prior grand jury testimony and his files. He examined Lightfoot and other witnesses at the Fifth Circuit Hearing, and Mr. Westling was provided the opportunity to examine Lightfoot at the Task Force Hearing.

Article IV. As noted above, Judge Porteous is well aware of the allegations and evidence related to his relationships both with attorneys Robert Creely and Jacob Amato and with Louis Marcotte – information that Judge Porteous is alleged to have concealed in connection with his 1994 background check. Furthermore, the evidentiary materials memorializing his statements consist of but a handful of documents, some of which were disclosed at the House Task Force hearings in November of 2009.

<sup>&</sup>lt;sup>5</sup>In a letter dated October 29, 2009, Mr. Schiff and Mr. Goodlatte alerted Mr. Westling to the potential conflict of interest in his taking a role in these proceedings on behalf of Judge Porteous that would require him to take a position or actions adverse to the Marcottes. It would be appropriate that Judge Porteous affirmatively waive any objection to Mr. Westling representing him arising from Mr. Westling's potential conflict so that no issue emerges at trial that would cause Mr. Westling to seek to withdraw and thus delay the proceedings.

We look forward to working with the Committee to expedite the proceedings in this case.

Sincerely,

Adam Schiff

House Impeachment Manager

Bob Goodlatte

House Impeachment Manager

cc:

Morgan Frankel Senate Legal Counsel

Attachments

## Attachment 4

## Congress of the United States

Washington, DC 20515

May 13, 2010

By Electronic and Regular Mail

Richard Westling, Esq. Ober Kaler Grimes & Shriver 1401 H Street, N.W. Suite 500 Washington, D.C. 20005

> Re: Impeachment of Judge G. Thomas Porteous— <u>Initial Discovery Request</u>

Dear Mr. Westling:

The purpose of this letter is to request certain discovery from Judge Porteous.

The House formally requests that Judge Porteous provide discovery of the following materials: 1) any tangible evidence Judge Porteous intends to use at trial; 2) any sworn or adopted statements from witnesses whom Judge Porteous intends to call at trial; and 3) transcripts or substantially verbatim statements of witnesses whom Judge Porteous intends to call at trial. These categories correspond to the categories of materials that the House has stated it will produce to Judge Porteous.

If you have questions, please contact Mark H. Dubester, 202-226-2404, or Harry Damelin, 202-226-0144.

Sincerely,

Alan I. Baron

Special Impeachment Counsel

## **Attachment 5**

## United States Senate washington, oc 20810

IMPEACHMENT TRIAL COMMITTEE

DISPOSITION OF PRETRIAL ISSUES

Upon consideration of the written submissions of the parties on pretrial issues and the oral argument on April 12, 1989, the committee has authorized the chair to issue the following rulings on behalf of the committee:

#### Preliminary Witness Lists

First, on three occasions, beginning on August 10, 1988, the Committee on Rules and Administration asked the parties for preliminary lists of witnesses with a description of the general nature of the testimony that is expected from each witness. The Rules Committee expressly stated that neither side would be precluded, by the submission of this preliminary information, from requesting subpoenas for other witnesses. On September 6, 1988, the House submitted a list of twenty-three witnesses that it anticipates calling. The House briefly described the nature of each witness's proposed testimony. On January 17, 1989, the House supplemented that list with six additional witnesses. Judge Hastings did not provide to the Rules Committee a list of his proposed witnesses in these Senate proceedings. Neither has Judge Hastings provided to this committee a preliminary list of the witnesses that he intends to call before us, other than to refer to material which he had provided last year to a subcommittee of the House Committee on the Judiciary.

(281)

It is imperative that Judge Hastings now provide his preliminary witness list without any further delay. The committee requires the list in order to complete its consideration of pretrial issues, including the fixing of an appropriate date to begin evidentiary hearings. Accordingly, Judge Hastings is directed to provide to the committee by noon on April 19, 1989, a preliminary witness list that identifies in good faith the witnesses that he intends to call before this committee. The witness list should also briefly state, in detail comparable to that already provided by the House for its anticipated witnesses, the nature of the testimony that Judge Hastings expects each listed witness would provide. This is to be a preliminary list. Judge Hastings may add, by showing good cause for not including them on the preliminary list, additional names when he submits his final witness list. In the absence of a showing of good cause, the committee may exclude the testimony of any witness who is not listed and described in the preliminary witness list.

The House has indicated that it may have additional witnesses. To the extent that those additional witnesses are now known to the House, the House should supplement its preliminary list by noon on April 19, 1989.

### Motion In Limine

Second, the House has moved in limine to exclude five categories of evidence as irrelevant.

The first category concerns the motivations of persons who investigated Judge Hastings in 1981 and then who prosecuted him in <u>United States v. Hastings</u>, Cr. No. 81-596-Cr-ETG. The third category concerns the motivations of persons who investigated the matters addressed by Grand Jury No. 86-3 (Miami) concerning the alleged disclosure by Judge Hastings of confidential wiretap information.

Judge Hastings correctly notes that the House has placed on its witness list several assistant United States attorneys and agents of the Federal Bureau of Investigation who would testify in connection with either the bribary and perjury allegations or the wiretap matter. Judge Hastings asserts that the House motion is premature. He also asserts that he should be able to inquire into the motivation and bias of the witnesses against him. As Judge Hastings has asserted a tenable basis for some degree of latitude in cross-examining the witnesses that the House will call, the committee denies at this time this portion of the House's motion. To the extent that Judge Hastings proposes to inquire into the motivations of persons who investigated and prosecuted him for a purpose other than impeaching witnesses that the House will call, the House motion is premature in

the absence of a firm indication from Judge Hastings, through the filing of a witness list, that he intends to call any such witnesses. We wish to make clear nonetheless that our denial at this time of this portion of the House motion should not be understood to invite an open-ended inquiry into the motivations of federal prosecutors and investigators. Rather, any such inquiry must be limited to evidence that the investigations were conducted in a manner intended to mislead a court or trier of fact as to Judge Hastings' guilt or innocence.

Categories two and four concern the motivations of persons who initiated, investigated, and considered the complaints that were filed against Judge Hastings in March, 1983, and September, 1986, with the Eleventh Circuit under the Judicial Conduct and Disability Act of 1980. Judge Hastings contends that this aspect of the House motion also is premature.

The issues that are presented by the articles concern Judge Hastings' conduct, not the conduct of members of the judicial branch or persons employed by it. Judge Hastings has made no showing that evidence in categories two and four would be relevant to the articles of impeachment. Moreover, a grant of the House motion with respect to categories two and four should help to focus the parties' preparation for trial on issues that will be germane to the Senate's consideration of the articles. The motion to exclude

evidence of the matters described in categories two and four is granted.

The fifth category in the House motion in limine is cumulative evidence on Judge Hastings' general character and reputation. We agree with Judge Hastings that this portion of the House motion in limine is premature. We expect that Judge Hastings will be mindful of the limitations that the committee placed on the number of character witnesses, and the total length of character testimony, in the Claiborne proceedings, and that, in composing his witness list, Judge Hastings will recognize the need to avoid cumulative evidence. We can address at a later date any question which arises about the need to impose limits on that testimony.

### Documentary Discovery

Third, Judge Hastings has moved for extensive pretrial discovery. He advocates that discovery be based on contemporary ideas about discovery in federal civil judicial proceedings. The House has proposed a scope of discovery that is modeled to a greater extent on federal criminal judicial proceedings. The House proposes to provide to Judge Hastings any exculpatory evidence that it possesses. The House also proposes that each party provide to the other party the documents that it proposes to offer in evidence, prior sworn, adopted, or approved statements of witnesses that each proposes to call, and substantially verbatim and

contemporaneously recorded statements of witnesses that each intends to call. The discovery proposed by the House should be completed as promptly as possible. We reject, however, the divergent theoretical limits -- expansive in Judge Hastings' view and constricted in the House's view -- that each side has advocated.

The House has expressed a concern about one House of Congress directing another House to produce records. We need not address at this time whether the Senate has that power in an impeachment proceeding, because we think that it should be sufficient to state principles and a schedule to guide these proceedings:

- (a) To the extent that the parties have had a disagreement about photocopying, we recommend to the House that the issue be resolved in Judge Hastings' favor and that the House provide to Judge Hastings copies of all documents that the House has no objection to providing on the basis of their content. To facilitate Judge Hastings' response to the House's proposed stipulations, a matter that will be discussed below, the House should provide those copies by April 21, 1989, a week from today's order.
- (b) The House -- which has proposed to provide exculpatory materials, certain prior statements of witnesses, and documents and other tangible evidence that it intends to introduce in evidence -- has indicated that it has provided

most but not all of that material to Judge Hastings. The House would like to defer further production until it receives equivalent material from Judge Hastings. We will be requiring comparable disclosure by Judge Hastings, but the production to Judge Hastings should not be delayed while that occurs. Again, because we will be requiring responses to the House's proposed stipulations, the House should provide this material to Judge Hastings by April 21.

(c) Concerning other documents, the sharing of information should be guided by a broader principle than that advanced by the House in its offer to provide exculpatory evidence and the prior sworn, adopted, approved, or substantially verbatim and contemporaneously recorded statements of witnesses. In addition to the interests of the House in its role as advocate for the articles of impeachment and the interests of Judge Hastings in defending against those articles, the Senate has an interest in the development of a record that fully illuminates the matters that it must consider in rendering a judgment that under the Constitution only the Senate may make. We therefore ask the House -- for documents that it has obtained from elsewhere in the government that are responsive to a particularized request from Judge Hastings -- to determine whether there are specific objections, such as the need to honor promised confidences to people who may be at risk, to production to

Judge Hastings. In the absence of specific objections by the House or by the governmental entity that provided the material to the House, which should be articulated in writing so that the parties and the committee may be apprised of them, the special constitutional process that we are now engaged in will be served best by the fullest disclosure possible. It may be that for some documents an appropriate course of action would be to provide them to the committee for an evaluation of their sensitive nature, if any, and a determination by the committee whether any restrictions should be placed on the terms of access to them. Again, because of the schedule that will be set forth below for responses to stipulations, the House should respond by May 3.

(d) Judge Hastings also has a burden that he has not yet met. It will be necessary for him to do more than simply demand everything that other people have. In order to facilitate the process that we are asking the House and the other branches to undertake, Judge Hastings should identify, with far greater particularity than he has to date, the records that are germane to issues in these proceedings. Also, if it would be of assistance to the holders of documents in determining their responses, he should articulate to them the basis for his requests. To enable the House to respond by May 3, Judge Hastings should submit his particularized requests by April 26.

- (e) Neither the Department of Justice nor the counsel or the members of the Investigating Committee of the Judicial Council of the Eleventh Circuit are before us. If Judge Hastings has requests for documents from either the Department, including the Federal Bureau of Investigations, or the Judicial Council, he should promptly make particularized requests to them by April 26. With knowledge of the committee's interest in the fullest disclosure possible, we would appreciate knowing of the Department's and the Council's responses at the earliest possible time.
- (f) Judge Hastings should provide his reciprocal discovery to the House by May 10, including all documents, tapes, and other tangible evidence he intends to offer in evidence, and sworn, adopted, approved, or substantially verbatim statements of witnesses that Judge Hastings intends to call.

#### Depositions

Fourth, Judge Hastings has asked that the Senate utilize its subpoens power to enable him to take depositions in advance of the committee's hearings. He has attached to his most recent request a list, which he has denominated a provisional list, of twenty-four Department of Justice attorneys and Federal Bureau of Investigation officials and agents. The list is taken from a list of provisional witnesses that Judge Hastings had submitted last year to a subcommittee of the House Committee on the Judiciary.

The committee knows of no precedent for the pretrial examination of witnesses in connection with a Senate impeachment trial. Nevertheless, the committee will give further consideration to Judge Hastings' request for depositions after receiving from him a statement that includes the following information: a list of proposed deponents; a proffer of the testimony he expects to elicit from each proposed deponent and the relevance of that testimony; whether the proposed deponent has testified or provided statements in prior proceedings and whether Judge Hastings has received or has had access to any transcripts or recorded statements; whether Judge Hastings has asked the proposed deponent to provide information voluntarily and, if he has, the response of the proposed deponent; and, if the committee provides for depositions but limits their number, what priorities Judge Hastings places among the depositions that he is requesting.

If Judge Hastings wishes to pursue his request for depositions, he should submit this statement by April 28, 1989.

It is the committee's hope and expectation that if either the House or Judge Hastings seeks an opportunity to obtain information from the Department of Justice, including the Federal Bureau of Information, that the Department and the Bureau will cooperate voluntarily to provide relevant information.

### **Stipulations**

Fifth, the House, on December 15, 1988, served an original and, on March 31, 1989, served a revised proposed stipulation of facts. The revised proposal reorganizes the original proposed stipulation of facts into fifteen categories. The House also served on December 15, 1988, a proposed stipulation of documents which asked that the parties stipulate that each of the listed documents is genuine. The proposed documentary stipulation also proposed other stipulations for designated categories of documents. The December 15, 1988 submission by the House on documentary stipulations stated the proposed stipulations did not preclude pertinent objections to the admissibility of the documents listed by the House based on matters not addressed in the stipulations.

On January 17, 1989, the House proposed that the Senate adopt a rule that any proposed stipulation of fact will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true. The House asked for a parallel rule on the authenticity of documents.

An early resolution of factual questions and questions about the authenticity and admissibility of documents that are not in dispute will enable the parties and the committee to focus their time and energies on matters that are truly in

disagreement. Also, the committee has been directed by the Senate to report to it on facts that are uncontested.

Accordingly, the committee accepts the House proposals. We direct Judge Hastings to respond to the House's proposed revised stipulations of fact, filed on March 31, 1989, by admitting their truth or serving and filing a specific objection that includes a proffer as to why the proposed stipulation should not be taken as true. With respect to documents, we direct Judge Hastings to respond to the House's proposed documentary stipulations, filed December 15, 1988, by admitting the matters set forth in that submission and by admitting the admissibility of the documents listed by the House, or by serving and filing a specific objection that includes a proffer as to why the proposed stipulation concerning each document should not be taken as true and the particular document admitted into evidence.

Judge Hastings has had nearly four months to evaluate the House's proposed stipulations. We direct that Judge Hastings' response be submitted no later than May 10, 1989. This should be a reciprocal process. Although Judge Hastings' has not proposed stipulations of his own, he may do so by May 10. If Judge Hastings does submit proposed stipulations by that day, the House should respond to them by May 24. The parties should engage in this process with an

eye towards resolving problems. Consequently, if a disagreement about a proposed stipulation can be resolved by redrafting the stipulation to be more accurate, or can be resolved by providing access to a specific document, then we would expect the parties to work together to settle differences between them.

### Evidentiary Principles

Sixth, the parties have expressed an interest in the evidentiary principles that will govern these proceedings. The committee's task is to receive and report evidence to the Senate. The Senate reserves the power to determine the competency, relevancy, and materiality of the evidence received by the committee. The committee is not bound by the Federal Rules of Evidence, although those rules may provide some guidance to the committee. Members of the Senate sit both as judges of law and fact. Precise rules of evidence are not needed in an impeachment trial to protect jurors, lay triers of fact, from doubtful evidence. In the end, the task of members of the Senate will be to weigh the relevance and quality of the evidence.

## Final Pretrial Statements

Lastly, the parties should file final pretrial statements by a date that the committee will designate when it issues an order setting a date for the commencement of testimony. These statements should include a final list of

witnesses with a brief statement of the nature of each witness's proposed testimony. The parties should also submit marked exhibits that each proposes to offer. Further, each party should set forth to the committee the legal principles that each believes is applicable to each article of impeachment, or, if appropriately grouped, set of articles. Although the committee will not reach conclusions of law, it is important for the committee, in determining the relevancy of evidence, to know from the parties the legal theories upon which each is proceeding. We will provide more detailed instructions to the parties about the contents of these pretrial statements.

### Deferred Matters

The committee is continuing to consider Judge Hastings' application for defense funds. The committee is also continuing to consider a schedule for its evidentiary hearings. The committee expects to issue an order or orders on these matters within a week.

Dated: April 14, 1989